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BERJASA INFORMATION SYSTEM SDN BHD v. TAN GAIK LEONG & ANOR

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
PRASAD SANDOSHAM ABRAHAM JCA
B HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEAL NO: W-02(W)-429-03-2016]
8 NOVEMBER 2016

C ***CIVIL PROCEDURE:*** *Judgments and orders – Judgment obtained for damages to be assessed – Application for directions for assessment of damages pursuant to judgment – Whether filed out of time – Whether exceeded one month period stipulated under O. 37 r. 1(1) of Rules of Court 2012 – Whether O. 37 r. 1(1) of Rules of Court 2012 had retrospective effect or should be applied prospectively – Whether substantive rights of plaintiff under judgment ought to be preserved*

D ***CIVIL PROCEDURE:*** *Assessment for damages – Application for – Application for directions for assessment of damages pursuant to judgment obtained – Whether filed out of time – Whether exceeded one month period stipulated under O. 37 r. 1(1) Rules of Court 2012 – Whether O. 37 r. 1(1) Rules of Court 2012 had retrospective effect or should be applied prospectively – Whether substantive rights of plaintiff* E *under judgment ought to be preserved*

On 7 February 2007, the appellant ('the plaintiff') obtained a judgment against the respondents ('the defendants') where the High Court ordered, *inter alia*, for damages to be assessed. On 20 May 2014, *vide* a notice of application filed pursuant to O. 37 r. 1(1) of the Rules of Court 2012 ('the ROC 2012'), F the plaintiff sought directions for the assessment of damages pursuant to the judgment. The defendants raised a preliminary objection that the plaintiff's application was out of time as it exceeded the one-month period stipulated under O. 37 r. 1(1) of the ROC 2012. The Deputy Registrar upheld the objection of the defendants and the application was accordingly dismissed. G Aggrieved, the plaintiff filed an appeal to the judge in chambers. The plaintiff submitted that since the judgment was obtained on 7 February 2007, O. 37 r. 1(1) of the ROC 2012 was not applicable. What was applicable was O. 37 r. 1(1) of the Rules of the High Court 1980 ('RHC 1980') which did not stipulate the one-month period as required by the current provision in H the ROC 2012. It was contended by the plaintiff that O. 37 r. 1(1) of the ROC 2012 could not apply retrospectively against a substantive right already obtained by the plaintiff in the judgment. The defendants, on the other hand, submitted, *inter alia*, that the applicable law should be the current provision in the ROC 2012 and not the RHC 1980 and that there was no extension of I time applied for by the plaintiff. The Judicial Commissioner ('JC') found favour with the submission of the defendants and held that the ROC 2012 is a subsidiary legislation purely on procedure and since it is on procedure, the ROC 2012 applied retrospectively. The JC held that since the plaintiff itself

had elected to use the ROC 2012 to make the application, the plaintiff must follow the current provision in the ROC 2012. His Lordship also opined that as the plaintiff was late by more than seven years since obtaining the judgment, the plaintiff must apply for an extension of time which the plaintiff had failed to do. The plaintiff's appeal was accordingly dismissed. Hence, this appeal. The issue for consideration was whether O. 37 r. 1(1) of the ROC 2012 should be applied retrospectively to the judgment obtained.

Held (allowing appeal)
Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) When the plaintiff obtained judgment against the defendants on 7 February 2007, there was no period prescribed for the plaintiff to commence the assessment of damages. Applying the principles laid down in the case of *Yew Bon Tew & Anor v. Kenderaan Bas Mara* ('*Yew Bon Tew*') which were applied by this court in *Sim Seoh Beng v. Koperasi Tunas Muda Sungai Ara Bhd* and *RHB Bank Bhd v. Ya'akob Mohd Khalib*, the plaintiff had the substantive rights under the judgment. To hold that O. 37 r. 1(1) of the ROC 2012 had a retrospective effect would result in unfairness, as it would impair the plaintiff's existing rights under the said judgment. (para 25)

(2) The plaintiff was correct to make the application under ROC 2012 as the RHC 1980 was no longer in existence. In that aspect, ROC 2012 was to be applied retrospectively *ie*, in relation to the manner in which the plaintiff should proceed with the assessment of damages. However, in relation to preserving the rights of the plaintiff under the judgment, the ROC 2012 should be applied prospectively. Flowing from the aforesaid, the plaintiff's failure to apply for an extension of time to pursue the assessment of damages was of no significance. (para 27)

(3) The JC had erred in merely confining himself to whether O. 37 r. 1(1) of the ROC 2012 was purely on procedure without considering further whether it would affect the substantive rights of the plaintiff, if applied retrospectively. The JC had erred in failing to undertake the approach as guided by the Privy Council in *Yew Bon Tew*. (para 28)

Bahasa Malaysia *Headnotes*

Pada 7 Februari 2007, perayu ('plaintif') memperoleh penghakiman terhadap responden-responden ('defendan-defendan') di mana Mahkamah Tinggi membuat perintah, antara lain, agar ganti rugi ditaksir. Pada 20 Mei 2014, melalui notis permohonan yang difailkan menurut A. 37 k. 1(1) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012), plaintif memohon arahan bagi taksiran ganti rugi menurut penghakiman tersebut. Defendan-defendan membangkitkan bantahan awalan bahawa permohonan plaintif difailkan luar masa kerana melebihi tempoh satu bulan yang ditetapkan bawah A. 37 k. 1(1) KKM 2012. Timbalan Pendaftar mengekalkan bantahan

defendan-defendan dan permohonan ditolak. Terkilan, plaintif memfailkan rayuan kepada hakim dalam kamar. Plaintif menghujahkan bahawa kerana penghakiman diperolehi pada 7 Februari 2007, A. 37 k. 1(1) KKM 2012 tidak terpakai. Yang terpakai adalah A. 37 k. 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT 1980') yang tidak menetapkan tempoh satu bulan seperti yang diperuntukkan oleh KKM 2012. Plaintif menghujahkan A. 37 k. 1(1) KKM 2012 tidak boleh terpakai secara retrospektif terhadap hak substantif yang diperolehi oleh plaintif dalam penghakiman yang diberi. Defendan-defendan pula menghujahkan, antara lain, bahawa undang-undang yang sepatutnya terpakai adalah peruntukan semasa KKM 2012 dan bukan KMT 1980 dan tiada lanjutan masa dipohon oleh plaintif. Pesuruhjaya Kehakiman ('PK') memutuskan berpihak pada defendan-defendan dan memutuskan selanjutnya bahawa KKM 2012 adalah perundangan subsidiari semata-mata atas prosedur dan oleh kerana adalah atas prosedur, KKM 2012 diguna pakai secara retrospektif. Pesuruhjaya Kehakiman memutuskan bahawa oleh kerana plaintif sendiri telah menggunakan KKM 2012 untuk membuat permohonan ini, plaintif harus mengikut peruntukan semasa KKM 2012. Pesuruhjaya Kehakiman juga berpendapat bahawa oleh kerana plaintif lambat lebih dari tujuh tahun sejak memperolehi penghakiman, plaintif harus memohon lanjutan masa, yang gagal dibuat oleh plaintif. Rayuan plaintif ditolak. Oleh itu, rayuan ini. Isu yang perlu dipertimbangkan adalah sama ada A. 37 k. 1(1) KKM 2012 harus terpakai secara retrospektif pada penghakiman yang diperolehi.

Diputuskan (membenarkan rayuan)
Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Apabila plaintif memperoleh penghakiman terhadap defendan-defendan pada 7 Februari 2007, tiada tempoh yang ditetapkan bagi plaintif untuk memulakan taksiran ganti rugi. Mengguna pakai prinsip-prinsip yang dibentangkan dalam kes *Yew Bon Tew & Anor v. Kenderaan Bas Mara* ('*Yew Bon Tew*') yang diguna pakai oleh mahkamah ini dalam kes *Sim Seoh Beng v. Koperasi Tunas Muda Sungai Ara Bhd* dan *RHB Bank Bhd v. Ya'akob Mohd Khalib*, plaintif mempunyai hak substantif bawah penghakiman itu. Untuk memutuskan bahawa A. 37 k. 1(1) KKM 2012 mempunyai kesan retrospektif akan menyebabkan satu ketidakadilan, kerana ini akan menjejaskan hak plaintif bawah penghakiman tersebut.

(2) Plaintif bertindak dengan betul apabila membuat permohonan bawah KKM 2012 kerana KMT 1980 tidak lagi wujud. Dari aspek itu, KKM 2012 harus diguna pakai secara retrospektif iaitu berkenaan cara plaintif harus teruskan dengan taksiran ganti rugi. Walau bagaimanapun, berkaitan pemeliharaan hak-hak plaintif bawah penghakiman, KKM 2012 harus terpakai secara prospektif. Dengan itu, kegagalan plaintif memohon lanjutan masa untuk meneruskan taksiran ganti rugi tidak penting.

(3) Pesuruhjaya Kehakiman terkhilaf apabila hanya membataskan dirinya pada persoalan sama ada A. 37 k. 1(1) KKM 2012 semata-mata atas prosedur tanpa mengambil kira sama ada ini akan menjejaskan hak-hak substantif plaintif jika diguna pakai secara retrospektif. PK terkhilaf apabila gagal mengambil pendekatan seperti yang digariskan oleh Majlis Privi dalam kes *Yew Bon Tew*.

Case(s) referred to:

CCM Chemical Sdn Bhd v. Glovco (M) Sdn Bhd [2013] 1 LNS 665 HC ***(refd)***

Govalan Arujuna v. Pengerusi Lembaga Pencegahan Jenayah & Ors [2016] 1 CLJ 772 HC ***(refd)***

RHB Bank Bhd v. Ya'akob Mohd Khalib [2008] 1 CLJ 80 CA ***(foll)***

Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 CLJ 491 CA ***(foll)***

Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd [2012] 3 CLJ 249 HC ***(refd)***

UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor and Another Case [2015] 11 MLJ 499 ***(refd)***

Yew Bon Tew & Anor v. Kenderaan Bas Mara [1983] 1 CLJ 11; [1983] CLJ (Rep) 56 ***(foll)***

Legislation referred to:

Bankruptcy Act 1967, s. 8(2), (2A)

Rules of Court 2012, O. 37 r. 1(1)

For the appellant - Kan Weng Hin, Joel Lim Phan Hong & Nur Muhaimin Mohd Husaimi; M/s WH Kan

For the respondents - Patrick Dass & Franklin Goonting; M/s Lim Soh & Goonting

[Editor's note: For the High Court judgment, please see Berjasa Information System Sdn Bhd lwn. Tan Gaik Leong & Seorang Lagi [2002] 1 LNS 402 (remitted).]

Reported by Suhainah Wahiduddin

JUDGMENT

Tengku Maimun Tuan Mat JCA:

[1] This was an appeal against the decision of the learned Judicial Commissioner (JC) in affirming the order of the Deputy Registrar that the appellant's application for directions for assessment of damages be dismissed.

The Background Facts

[2] On 7 February 2007, the appellant (the plaintiff) obtained a judgment against the respondents (defendants) where the High Court ordered, *inter alia*, for damages to be assessed.

[3] Dissatisfied with the judgment, the defendants appealed to this court. On 24 November 2010, the appeal was dismissed and the defendants' application to the Federal Court for leave to appeal against the order of this court was also dismissed on 31 October 2012.

[4] On 20 May 2014, *vide* a notice of application filed pursuant to O. 37 r. 1(1) of the Rules of Court 2012 (the application), the plaintiff sought directions for the assessment of damages pursuant to the judgment.

[5] When the application came up for hearing before the learned Deputy Registrar on 20 May 2015, learned counsel for the defendants raised a preliminary objection that the plaintiff's application was out of time as it exceeded the one month period stipulated under O. 37 r. 1(1) of the Rules of Court 2012.

[6] Learned Deputy Registrar upheld the objection of the defendants. The application was accordingly dismissed with no order as to costs. Aggrieved, the plaintiff filed an appeal to the judge in chambers.

Appeal To The Judge In Chambers

[7] Before the learned JC, the issue was limited to the preliminary objection, namely whether the plaintiff's application for directions for assessment of damages was properly made since it was filed more than one month from the date of obtaining the judgment.

[8] For the plaintiff, it was submitted that since the judgment was obtained on 7 February 2007, O. 37 r. 1(1) of the Rules of Court 2012 was not applicable. What was applicable was O. 37 r. 1(1) of the Rules of the High Court 1980, which did not stipulate the one month period as required by the current provision in the Rules of Court 2012. It was contended by the plaintiff that O. 37 r. 1(1) of the Rules of Court 2012 cannot apply retrospectively against a substantive right already obtained by the plaintiff in the judgment.

[9] The defendants on the other hand submitted the following:

(i) the applicable law should be the current provision in the Rules of Court 2012 and not the Rules of the High Court 1980;

(ii) there was no affidavit to explain the delay by the plaintiff;

(iii) there was also no extension of time applied for by the plaintiff; and

(iv) the application itself was premised on the Rules of Court 2012 and not on Rules of the High Court 1980.

[10] The learned JC found favour with the submission of the defendants. His Lordship held that the Rules of Court 2012 is a subsidiary legislation purely on procedure and since it is on procedure, the Rules of Court 2012 applies retrospectively. In support of his finding, the learned JC cited the following authorities:

(i) *Govalan Arujuna v. Pengerusi Lembaga Pencegahan Jenayah & Ors* [2016] 1 CLJ 772;

(ii) *Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 CLJ 491;

(iii) *UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor and Another* Case [2015] 11 MLJ 499;

(iv) *Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd* [2012] 3 CLJ 249; [2012] 7 MLJ 597; and

(v) *CCM Chemical Sdn Bhd v. Glovco (M) Sdn Bhd* [2013] 1 LNS 665.

[11] The learned JC further held that since the plaintiff itself had elected to use the Rules of Court 2012 to make the application, the plaintiff must follow the current provision in the Rules of Court 2012. His Lordship opined that as the plaintiff was late by more than seven years since obtaining the judgment, the plaintiff must apply for an extension of time which the plaintiff has failed to do.

[12] His Lordship concluded that the failure of the plaintiff to adhere to the time period of one month, coupled with the absence of any application for extension of time, was fatal to the application. The Deputy Registrar's decision was thus upheld. The plaintiff's appeal was accordingly dismissed with costs, hence the appeal before us, which we had unanimously allowed for the reasons that follow.

The Appeal

[13] We do not propose to set out the respective submissions, suffice to state that the appeal concerned O. 37 r. 1(1) of the Rules of Court 2012 which came into effect on 1 August 2012 and which reads:

> 1. Assessment of damages by Registrar. (O. 37 r. 1)
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> (1) Where judgment is given for damages to be assessed and no provision is made by the judgment as to how they are to be assessed, the damages shall, subject to the provisions of this Order, be assessed by the Registrar, and the party entitled to the benefit of the judgment shall, within one month from the date of the judgment, apply to the Registrar for directions and the provisions of Order 34 shall, with the necessary modifications, apply.

[14] The issue for our consideration was whether O. 37 r. 1(1) of the Rules of Court 2012 should be applied retrospectively to the judgment obtained by the plaintiff on 7 February 2007.

Our Findings

[15] Whilst we agreed with the learned JC that the Rules of Court 2012 is a procedural law, we disagreed that simply because the Rules of Court 2012 concern procedural law, it must be applied retrospectively to the judgment dated 7 February 2007.

[16] In this regard, we found that the learned JC failed to consider the full effect of the case of *Sim Seoh Beng (supra)* cited by him.

[17] *Sim Seoh Beng* dealt with the issue whether the amendment to O. 29 of the Rules of the High Court 1980 which came into effect on 1 October 1993 and which provides for the automatic lapse of an injunction order at the end of two weeks from the date on which it was granted, applies retrospectively to an injunction order dated 11 March 1993. (Prior to 1 October 1993, the injunction order would continue until set aside on the merits and not lapse by mere effluxion of time).

[18] This court in *Sim Seoh Beng* held that the amendment introduced to O. 29 of the Rules of the High Court 1980 should not be construed as retrospective provisions. For ease of reference, we will reproduce *in extenso* the judgment of Gopal Sri Ram JCA (as he then was) where at p. 495, His Lordship said:

> The traditional approach to the interpretation of statutes (which includes subsidiary legislation such as the Rules of the High Court 1980) in this area is contained in the general rule that, in the absence of express words or necessary implication, statutes affecting substantive rights are prospective while those affecting procedure are retrospective. In the case of rules of court, there is a rider to the general proposition. It is this. A rule of court should not be given an interpretation that would result in unfairness or produce a manifest injustice: *Bank of America v. Chai Yen* [1981] 1 MLJ 198 at p. 199 ...
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> ...
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> The classification of a statute in general terms as procedural or substantive is singularly unhelpful; for a statute may at once be procedural for one purpose and substantive for another, depending upon the context in which it is being construed: *Maxwell v. Murphy* (1957) 96 CLR 261; *In the Estate of Fuld (No 3)* [1968] P 675 at p 695; [1965] 3 All ER 776 at 779; [1966] 2 WLR 717 at p 734 per Scarman J; *Re Dosabhai Ardeshir Cooper* (1950) 52 Bom LR 625. It calls for a construction of the statutory provision as a whole: *Ramanathan Chettiar v. Lakshmanan Chettiar* [1963] 1 Mad LJ 46 at p 50.
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> In our judgment, the correct test to be applied to determine whether a written law is prospective or retrospective is to first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, *prima facie* that law must be construed as having prospective effect only, unless there is clear indication in the enactment that is in any event to have retrospectivity. Contra, where the written law does not affect substantive rights.

[19] The learned JCA further said at pp. 496-497:

> We derive support for the view that we have expressed from the decision of the Privy Council in *Yew Bon Tew v. Kenderaan Bas Mara* [1983] 1 AC 553 (also reported in [1983] 1 MLJ 1). It was not referred to by either side

to the learned judge in the present case. Neither is it mentioned in the *Malayan Banking Bhd v. Siong Electronics Industries* (1981) Sdn Bhd which commended itself to the judge and appears to have greatly influenced him in coming to the conclusion that he did.

In *Yew Bon Tew*, the plaintiff was injured in a collision involving the defendant's vehicle. The accident occurred on 5 April 1972. The relevant time limit for instituting proceedings against the defendant was prescribed by s. 2 of the Public Authorities Protection Ordinance 1948. As at the date of the collision, the section provided a period of 12 months. The plaintiff did not commence any action within the prescribed period. On 5 June 1974, that is to say a little more than two years after the collision and about a year after time had run against the plaintiff, Parliament enacted an amendment to the principal statute, extending the period of limitation to 36 months. On 20 March 1975, the plaintiff issued writ claiming damages for the injuries received by him in the collision of 5 April 1972. At the trial, the defendant raised a preliminary objection on the maintainability of the action. Mohd Azmi J ruled in the plaintiff's favour. The defendant appealed to the Federal Court which allowed the appeal and dismissed the suit. The plaintiff then appealed to the Privy Council which upheld the Federal Court and dismissed the appeal. Because of its importance, it is necessary to refer *in extenso* to the advice of the Board which was on that occasion delivered by Lord Brightman. This is what he said ([1983] 1 AC 553 at pp 558-559; [1983] 1 MLJ 1 at pp 2-3):

> A statute of limitation may be described either as procedural or as substantive. For example, in English law, at the expiration of the period prescribed for any person to bring an action to recover land, the title of that person to the land is extinguished. Such a limitation therefore goes to the cause of action itself. In most cases however the English Limitation Act only takes away the remedies by action or by set-off; it goes only to the conduct of the suit; it leaves the claimant's right otherwise untouched in theory so that, in the case of a debt, if the statute-barred creditor has any means of enforcing his claim other than by action or set-off, the Act does not prevent his recovering by those means. In this sense, the Ordinance of 1948 and the Act of 1974 are procedural: cf *Harris v. Quine* (1896) LR 4 QB 653 and *Rodriguez v. RJ Parker (Male)* [1967] 1 QB 116.
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> Apart from the provisions of the interpretation statutes, there is at common law a *prima facie* rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is, however, said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.

> *But these expressions 'retrospective' and 'procedural', though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (eg because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (eg because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself.* (emphasis added).

Later in his judgment he reiterated ([1983] 1 AC 553 at p 563; [1983] 1 MLJ 1 at p. 5):

> *Their Lordships consider that the proper approach to the construction of the Act of 1974 is not to decide what label to apply to it, procedural or otherwise but to see whether the statute, if applied retrospectively in a particular type of case, would impair existing rights and obligations.* (emphasis added).

I have laid emphasis on these last two passages because in them is the key to the whole problem that is now under investigation. It is an approach that was overlooked by the judge in the instant case.

[20] The same issue was canvassed in *RHB Bank Bhd v. Ya'akob Mohd Khalib* [2008] 1 CLJ 80; [2008] 1 MLJ 157, in relation to sub-s. (2A) of s. 8 of the Bankruptcy Act 1967, which came into force on 17 July 1992.

[21] In *RHB Bank Bhd (supra)*, the respondent (defendant) charged his land to the appellant (plaintiff) as security for an overdraft facility. The charge was registered on 29 December 1986. The defendant defaulted in payment and on 30 September 2002, the plaintiff applied for an order for sale of the defendant's property. The plaintiff claimed that the defendant owed the sum of RM116,774.89 which was made up of a principal sum of RM20,000 and the balance being interest on the principal sum.

[22] On 17 May 2004, ie, the hearing date of the application for the order for sale, the court was informed that the defendant was made a bankrupt on 24 November 1986. The High Court Judge granted the order for sale but he also decided that the amount due to the plaintiff was only the principal sum of RM20,000. The plaintiff's claim for the interest on the principal sum was disallowed by virtue of s. 8(2A) of the Bankruptcy Act.

[23] Subsection (2) and (2A) of s. 8 of the Bankruptcy Act 1967 provides:

> (2) This section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed - nor shall it operates to prejudice the right of any person to receive any payment under or by virtue of the provisions of s. 31 of the Employment Act 1955 of the States of West Malaysia or any corresponding provisions in Sabah and Sarawak.

(2A) Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realize his security within six months from the date of the receiving order.

[24] The plaintiff appealed to this court against the order of the High Court in disallowing its claim for payment of interest on the principal sum. This court referred to *Yew Bon Tew* and held that sub-s. (2A) of s. 8 of the Bankruptcy Act did not have a retrospective effect. In allowing the appeal, Hasan Lah JCA (now FCJ) said at p. 162:

[12] In the instant case by virtue of subsection (2) of s 8 of the Bankruptcy Act the plaintiff had acquired a right as a secured creditor to realize its security when the land was charged to the plaintiff on 29 December 1986. As such the law applicable to the plaintiff was the law as it was on 29 December 1986. Subsection (2A) which was introduced by the Bankruptcy (Amendment) Act (Act A827) and which came into force on 17 July 1992 could not, therefore, take away the plaintiff's accrued right under s. 8(2) as the amending Act did not clearly and specifically provide that subsection (2A) would have a retrospective effect. It was therefore not intended to have a retrospective effect. To read otherwise it would produce an unjust result as that subsection (2A) deals with a substantive right.

[25] Coming back to the present appeal, when the plaintiff obtained judgment against the defendants on 7 February 2007, there was no period prescribed for the plaintiff to commence the assessment of damages. Applying the principles laid down by the Privy Council in *Yew Bon Tew* which were applied by this Court in *Sim Seoh Beng (supra)*, and *RHB Bank Bhd (supra)*, the plaintiff had the substantive rights under the judgment and to hold that O. 37 r. 1(1) of the Rules of Court 2012 had a retrospective effect would result in unfairness, as it would impair the plaintiff's existing rights under the said judgment.

[26] As for the contention that the plaintiff must follow O. 37 r. 1(1) of the Rules of Court 2012 because the plaintiff itself has cited Rules of Court 2012 in its application, the answer is found in the passage quoted from *Yew Bon Tew* above, namely that "A statute which is retrospective in relation to one aspect of a case ... may at the same time be prospective in relation to another aspect of the same case.".

[27] In our judgment, the plaintiff was correct to make the application under Rules of Court 2012 as the Rules of the High Court 1980 were no longer in existence. In that aspect, the Rules of Court 2012 was to be applied retrospectively, ie, in relation to the manner in which the plaintiff should proceed with the assessment of damages. However, in relation to preserving the rights of the plaintiff under the judgment, the Rules of Court 2012 should be applied prospectively. Flowing from the aforesaid, we were of the view that the plaintiff's failure to apply for an extension of time to pursue the assessment of damages was of no significance.

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Conclusion

[28] Premised on all the above, we were unanimous in our view that the learned JC erred in merely confining himself to whether O. 37 r. 1(1) of the Rules of Court 2012 was purely on procedure without considering further whether it would affect the substantive rights of the plaintiff, if applied retrospectively. Put another way, the learned JC erred in failing to undertake the approach as guided by the Privy Council in *Yew Bon Tew (supra)*.

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[29] We therefore allowed the appeal and directed that the matter be remitted to the Deputy Registrar of the High Court for the hearing of the plaintiff's application for directions for assessment of damages.

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